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BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS,
THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF
CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

PRIVY COUNCIL REPORTS

PUBLIC PROSECUTOR v. FAN YEW TENG

[P.C. (Lord Wilberforce, Lord Hodson, Lord Diplock,
Lord Simon of Glaisdale and Lord Salmon) May 2, 1973]
[Privy Council Appeal No. 24 of 1972]

Criminal Law and Procedure — Transfer of a case for trial in High Court — Whether case must be tried by judge who made the order of transfer — Whether preliminary inquiry essential before trial in High Court — Criminal Procedure Code (F.M.S. Cap. 6), ss. 138 and 417.

In this case the respondent had been originally charged for sedition before a Sessions Court. He applied for the case to be transferred to the High Court and the case was heard in the High Court without a preliminary inquiry being previously held. The respondent subsequently appealed to the Federal Court who declared the trial to have been a nullity, as no preliminary inquiry had been held ([1971] 2 M.L.J. 271). The Public Prosecutor appealed to the Privy Council.

Held: (1) section 138 of the Criminal Procedure Code which provides that no person shall be tried before the High Court unless he shall have been committed for trial after a preliminary inquiry, is clear, unambiguous and of general application; and it applies to all trials of the High Court including those following an order of transfer made under section 417 of the Criminal Procedure Code;

(2) the Federal Court's construction of sections 138 and 417 of the Criminal Procedure Code was correct and the appeal should be dismissed;

(3) where an order for transfer is made under section 417 of the Criminal Procedure Code, it is not necessary that the case be tried by the judge who made the order of transfer.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

R. A. Gatehouse Q.C. and N. W. Lyell for the appellant.

L. J. Blom-Cooper Q.C., Eugene Cotran and *D. P. Xavier* for the respondent.

Lord Salmon (delivering judgment of the Board): On the 11th May 1971 the respondent was convicted before Raja Azlan Shah J. of an offence under section 4(1)(c) of the Sedition Act 1948 (Revised 1969) and fined \$2,000 and in default six months imprisonment. He appealed to the Federal Court against his conviction and sentence. That court by a majority (Azmi L.P., Ong C.J., Suffian and Ong Hock Sim F.J.J.; Ali F.J., dissenting) allowed the appeal against conviction, declaring the trial to have been a nullity. From that decision the Public Prosecutor now appeals to this Board.

A The respondent had originally been charged before the President of the Sessions Court; but on the 16th March 1971 he successfully applied under section 417(b) of the Criminal Procedure Code to Abdul Hamid J. for the transfer of his trial to the High Court.

The respondent on his appeal to the Federal Court relied on two points to support his contention that his trial had been a nullity.

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1. That section 138 of the Criminal Procedure Code enacted that no person could be tried before the High Court unless previously committed for trial after a preliminary inquiry under the provisions of Chapter XVII of the Code, and that no such committal had taken place; and
 2. That if an order for transfer of a trial were made under section 417(b), only the judge who made the order had any power to try the case, and that the judge who made the order of transfer, namely Abdul Hamid J., did not try the case.

C Section 138 of the Code reads as follows:

D "138. The following procedure shall be adopted in inquiries before a Magistrate where the inquiry is held with a view to committal for trial before the High Court and no person shall be tried before such Court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter."

Section 417 of the Code reads as follows:

- E "417. Whenever it is made to appear to a Judge —
- (a) that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate to him; or
 - (b) that some question of law of unusual difficulty is likely to arise; or
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- (d) that an order under this section will tend to the general convenience of the parties or witnesses; or
 - (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code;

F he may order —

G that any offence be inquired into or tried by any Court not empowered under sections 121 to 126 but in other respects competent to inquire into or try such offence; or that any particular criminal case be transferred to and tried before himself;

...."

Their Lordships will first consider the respondent's second point which can speedily be disposed of. It failed in the Federal Court; but the respondent's counsel has sought to rely on it before this Board in order to support the Federal Court's decision that the trial

had been a nullity. Section 417 is not felicitously drafted, as it is impossible to give each of its words its strict literal meaning and at the same time make any sense of the section. For example, the words in paragraph (a) "any criminal court subordinate to him" cannot have their strictly literal meaning but must mean any *particular* criminal court subordinate to him. Yet later on when the Legislature intends to refer to any particular criminal case it uses the word "particular". It is, however, impossible to suppose that the Legislature contemplated that a transfer should only be ordered under paragraph (a) in the unlikely event that a fair and impartial inquiry or trial could not be had in any subordinate court whatever. Clearly it intended to deal with a fair and impartial inquiry or trial being impossible in a particular inferior court, and went on to make provision for the inquiry or trial to be held in some other inferior court or transferred to the High Court.

Similarly, their Lordships cannot accept that the word "himself" towards the end of section 417 can be meant to refer to the very judge who made the order of transfer. The words "a judge" at the beginning of the section clearly refer to any judge of the High Court and in its context the word "himself" at the end of the section refers to any judge of the High Court. If the section had been worded "whenever it is made to appear to the High Court" it would have continued after paragraph (e) "it may order . . . that any particular criminal case can be transferred to and tried before *itself*." Their Lordships do not consider it feasible that the form of words actually used was intended to have any other meaning. Their Lordships agree with the Federal Court that "there is neither rhyme nor reason in holding that the same judge must try the case once he has made the order of transfer". Indeed, so to hold would lead to unnecessary difficulties should the judge who ordered the transfer be incapacitated, retired or dead when the case came on for trial. Their Lordships entirely agree with the Federal Court in rejecting the respondent's second point.

The respondent's first point is, however, more difficult and raises a question of more general importance. The last part of section 138, "no person shall be tried before such court [the High Court] unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter", appears to their Lordships to be clear, unambiguous and of general application. It makes no reservation in respect of a trial before the High Court following upon an order under section 417, as it could have done and as one would have expected it to do had it intended to exclude such a trial from its ambit. Their Lordships can find no justification for implying such a reservation into section 138, particularly as that section may provide valuable safeguards for a defendant. It ensures that a defendant shall not face trial in the High Court unless an inferior court is satisfied that on the evidence adduced by the prosecution there is a *prima facie* case against him, and also that before he stands trial he shall be acquainted with the evidence which he will have to meet.

As already indicated it is impossible to give each of the words in section 417 its strict literal meaning. In

A their Lordships' view the words "transferred to and tried" in the High Court mean no more than "transferred for trial" to the High Court. Section 417 has to be read in conjunction with section 138 and the latter section makes it plain that the trial can only take place in the High Court if the defendant is previously committed for trial in accordance with the provisions of Chapter XVII.

B There is no reason why the High Court judge who makes an order for transfer under section 417 should give any directions in respect of committal proceedings and no reason therefore to attach any importance to the omission from section 417 of any reference to committal proceedings, for which ample provision is already made in Chapter XVII.

C Counsel for the Public Prosecutor has attempted to support this appeal by contrasting the language of section 417 and that of section 177 of the Criminal Procedure Code, which reads as follows:

D "177. In any trial before a Magistrate in which it appears at any stage of the proceedings that from any cause the case is one which in the opinion of such Magistrate ought to be tried by some Court of higher jurisdiction than his own, or if before or during such trial application is made by the Public Prosecutor, the Magistrate shall stay proceedings and transfer the case to such higher Court or proceed under Chapter XVII with a view to the committal of the accused for trial by the High Court, and shall record such order upon the proceedings."

E The argument is that since committal is expressly mentioned in section 177 when a case is to be transferred for trial to the High Court, the fact that it is not mentioned in section 417 suggests that committal is not necessary before trial in the High Court following upon an order under section 417. Their Lordships cannot accept this argument. The omission in section 417 of any reference to committal proceedings has already been dealt with. As for section 177, the Magistrate before whom a trial is being held or is about to be held, is the person to whom an application to transfer the trial to the High Court is made under section 177. If the case is to be transferred to the High Court the Magistrate already seized of the case is clearly the appropriate Magistrate to conduct the committal proceedings and section 177 naturally provides that he shall do so.

G An application may be made under section 177 for "any cause", which would include any of the grounds set out in section 417. It would be odd if the Legislature intended to give the Public Prosecutor the right to deprive a defendant of the benefit of committal proceedings by electing to apply for a transfer under section 417 rather than under section 177.

H On the particular facts of the present case the respondent has not suffered one iota of prejudice. It was he who made the application for transfer. None of the facts was in dispute. If there had been committal proceedings, he must have been committed for trial and the result of the trial would have depended solely upon the difficult points of law in issue. Moreover at the trial he never took the point that the court lacked jurisdiction to try him because he had not been committed for trial. No question of waiver however has or could successfully have been argued before this Board. Everything depends upon the true construction

of the Statute, which has a much wider application than to the special facts of this particular case. It may be that an amendment to the Statute is desirable in order to make committal proceedings unnecessary in such very special circumstances as these. But this is irrelevant; the Board must apply the law as it now exists and their Lordships are of the opinion that section 138 applies to all trials in the High Court including those following an order made under section 417.

There are many cases which can be tried by inferior courts or by the High Court. Suppose such a case brought for trial before an inferior court (in which there could of course be no question of committal proceedings), it is not only the defendant but the Public Prosecutor also who can apply for a transfer of the trial to the High Court under section 177 or section 417 if it subsequently appears that the case is of sufficient importance to be a High Court case. Suppose that the Public Prosecutor applies under section 417 for a transfer of the trial to the High Court on the ground, as in this present case, that some question of law of unusual difficulty is likely to arise or on the ground that such a transfer is expedient for the ends of justice. In the former case, the point of law might depend, as it so often does, upon facts which are hotly in dispute. In the latter, the case might turn entirely upon disputed facts, no point of law arising at all. If the Public Prosecutor had originally chosen trial in the High Court clearly there would have been committal proceedings and the defendant would have known the evidence he had to meet at his trial. He would also have enjoyed the chance the inferior court might have held that no *prima facie* case had been made out and might thus have been saved the worry and expense of standing trial. It does not seem likely that the Legislature intended that the Public Prosecutor should be enabled to deprive a defendant of these valuable rights by changing his mind and asking at a later stage for the trial to be transferred to the High Court. Had this been the intention of the Legislature it would surely have been clearly stated. Their Lordships are satisfied that the Federal Court's construction of sections 138 and 417 is correct and for these reasons their Lordships will report to the Head of Malaysia that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Stephenson, Hurwood & Tatham; Hat-chett Jones & Co.*

A BANK NEGARA INDONESIA v. PHILIP HOALIM

[P.C. (Lord Wilberforce, Lord Simon of Glaisdale and Lord Salmon) May 14, 1973]

[Privy Council Appeal No. 17 of 1972]

Landlord and Tenant — Rent controlled building — Reconstruction of building — Whether a new building — Assurances given to tenant — Promissory estoppel — Waiver — Control of Rent Ordinance, 1953, s. 2.

The appellants had claimed possession of a front room on the third floor of a building owned by the appellants. The room was occupied by the respondent as a tenant of the appellants. The appellants claimed that although the premises were originally subject to the Control of Rent Ordinance, they had been so extensively altered that the building had become a new building. They claimed that the tenancy was a monthly tenancy and that it had been validly determined by a notice to quit. The respondent did not dispute the service of the notice to quit but relied upon two defences. First he claimed protection under the Control of Rent Ordinance, 1953. Secondly, he set up an understanding between him and the previous landlord, who had given him the assurances (a) that the respondent if he moved to the third floor would enjoy the same protection as he enjoyed in respect of the first floor under the Ordinance; (b) that so long as he continued to practise his profession, the landlords would not ask him to leave. The respondent claimed that the appellants were therefore estopped from claiming possession of the premises against him.

At the trial before the High Court it was held that there had been a fundamental change in the building and that the building had become a new building. The learned trial judge however held that the appellants were estopped from giving the respondent a notice to quit for as long as the respondent carried on his profession as an advocate and solicitor on the premises ([1972] 1 M.L.J. 233 at p. 234). On appeal, the Court of Appeal held that the building was not a new building but they agreed that the appellants were estopped from giving a notice to quit for as long as the respondent carried on his profession on the premises ([1972] 1 M.L.J. 233 at p. 237). The appellants appealed to the Privy Council.

Held: (1) the trial judge was amply justified in his conclusion that a new building had come into existence and no sufficient ground had been shown for disturbing his finding;

(2) the nature of the assurance and the circumstances in which it was given bring into play the doctrine of promissory estoppel and this estoppel prevented the appellants from availing themselves of their legal right to remove the respondent so long as he carried on his profession there;

(3) the benefit of the estoppel was not removed by the respondent's agreement to have the rent increased and to enter into a three year lease of the premises.

Cases referred to:—

- (1) *Eastern Realty Co. Ltd. v. Chan Hua Seng* [1967] 2 M.L.J. 195.
- (2) *Kai Nam v. Ma Kan Chan* [1956] A.C. 358.
- (3) *Rogers v. Hyde* [1951] 2 K.B. 923.
- (4) *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439, 448.
- (5) *Birmingham and District Land Co. v. London and North Western Railway Co.* (1888) 40 Ch.D. 268, 268.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

H. E. Francis Q.C. and *P. J. Pillet* for the appellants.

Y. R. Jumabhoy for the respondent.

Lord Wilberforce (delivering judgment of the Board): This is an appeal from a judgment of the Court of Appeal in Singapore dismissing an appeal by the plaintiffs in the action from a judgment of Chua J. in the High Court of Singapore.